

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

January 31, 1997

Cecil W. Crowson

Appellate Court Clerk

**FILED**

STATE OF TENNESSEE, )

C.C.A. NO. 01001-96-0006

Appellee, )

VS. )

BEDFORD COUNTY

WILLIAM TERRY MARTIN, )

HON. CHARLES LEE  
JUDGE

Appellant. )

(Vehicular Homicide)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF BEDFORD COUNTY

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant brings this appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by a Bedford County jury of vehicular homicide. He was sentenced as a Range I offender to four years and nine months in the Bedford County Jail, seven years probation and his license was suspended for seven years. He appeals his conviction, raising two issues: (1) That the evidence was insufficient to support a guilty verdict for vehicular homicide, in particular, that he did not possess the requisite mens rea of recklessness; and (2) that the trial court erred in refusing to grant the Defendant's request for a special jury instruction. We affirm the judgment of the trial court.

On Sunday, July 17, 1994, at approximately 8:20 p.m., the Defendant, William Terry Martin, was traveling southbound on Highway 231. His ten-year old son was a passenger, seated in the front seat of his vehicle. He was operating a silver, 1989 Pontiac Grand Am and left Smyrna, Tennessee heading south toward Shelbyville, Tennessee. Scott and Diane Reed, two witnesses in this case, left a church service in Smyrna and were also traveling south on Highway 231 behind the Defendant's vehicle. Highway 231 is a two-lane blacktop road. The weather was clear and the roadway was dry, but it was dusk and drivers were turning on their headlights.

As the Reeds followed the Defendant, they turned on their headlights. Mr. Reed testified that he saw no taillights on the Defendant's car. The Reeds followed the Defendant for approximately ten minutes before the accident in

question occurred. They first observed the Defendant veer onto the right shoulder of the road and pull back onto the road. They did not see the Defendant apply his brakes. He did appear to be driving within the speed limit of fifty-five miles per hour. They observed the Defendant cross the center line and recalled that on at least four occasions, he narrowly missed a head-on collision with the oncoming traffic. The Reeds described the driver as an adult and said the passenger appeared to be a child because his head did not reach as far above the headrest on the seat. They saw the driver's head move from side to side and occasionally slump, then regain a straight posture. They recalled in particular the second or third occasion when the Defendant nearly hit an oncoming van. After observing the Defendant for a short period of time, the Reeds increased the distance between their car and the Defendant's vehicle to approximately one-hundred yards.

On or about the fourth major drift into the opposite lane, the Defendant collided with a Honda driven by the victim, Mr. Milton Sanders. The impact occurred on the left front portion of the Defendant's and the left front portion of the victim's vehicles. The force of the collision spun the victim's car, which came to rest in the front yard of a house near the highway. Another witness to the collision, Dr. Albert Caffey, was following the victim's vehicle heading northbound. He observed the Defendant approaching, then suddenly veering across the center line, striking the victim's car. He saw the victim's car spin around and Dr. Caffey drove between the two vehicles just after the collision. He stopped his car and ran to the victim's vehicle. The front passenger side had sustained severe damage. Dr. Caffey checked for the victim's pulse and determined that he was dead.

Mr. Reed stopped his vehicle and went over to the Defendant's car. The Defendant's son was standing near the vehicle. Mr. Reed checked on the Defendant, who was still in his car. He testified that he detected the odor of alcohol and saw some beer cans in the back seat.

The Tennessee State Trooper who first arrived at the scene of the collision testified that the Defendant was "very erratic" and that he "wouldn't hold still." He did not want to go to the hospital and the EMS personnel who had also arrived at the scene had to strap him down to transport him in the ambulance. The Trooper noted the smell of alcohol on the Defendant. He was unable to perform any field sobriety tests on the Defendant because of his erratic condition.

The Trooper found no beer cans or alcoholic beverage containers in the Defendant's vehicle. At the hospital, the Defendant's blood was drawn for a drug screen and blood alcohol test, which were performed by the TBI laboratory in Donelson, Tennessee. The Defendant's blood was negative for alcohol, but a trace amount of Valium was detected.

The Defendant was subsequently charged with vehicular homicide<sup>1</sup> on September 22, 1994. A Bedford County jury found him guilty of vehicular homicide on January 30, 1995. He now brings this appeal.

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<sup>1</sup> Tenn. Code Ann. § 39-13-213.

## I. Sufficiency of the Evidence

As his first issue, the Defendant asserts that the evidence was insufficient to support a guilty verdict of vehicular homicide. We note initially that the Defendant raised the sufficiency question as two issues, one of them focusing on the mens rea for the offense and one asserting a general sufficiency argument. However, we will address the arguments as one sufficiency of the evidence issue.

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the

trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

The Defendant was convicted of vehicular homicide and the statute reads:

(a) Vehicular homicide is the reckless killing of another by the operation of an automobile, airplane, motorboat or other motor vehicle:

(1) As the proximate result of conduct creating a substantial risk of death or serious bodily injury to a person; or

(2) As the proximate result of the driver's intoxication as set forth in § 55-10-401. For the purposes of this section, "intoxication" includes alcohol intoxication as defined by § 55-10-408, drug intoxication, or both.

(b) Vehicular homicide is a Class C felony, unless it is the proximate result of driver intoxication as set forth in subdivision (a)(2), in which case it is a Class B felony.

(c) The court shall prohibit a defendant convicted of vehicular homicide from driving a vehicle in this state for a period of time not less than three (3) years nor more than ten (10) years.

Tenn. Code Ann. § 39-13-213.

The Defendant was charged and convicted of the offense under § 39-13-213(a)(1). The indictment stated that the Defendant "recklessly did kill Milton Sanders by the operation of an automobile, the killing of Milton Sanders being the proximate result of William Terry Martin's conduct which created a substantial risk of death or serious bodily injury to a person." The Defendant contends that the proof was insufficient to support every element of the offense beyond a reasonable doubt.

His primary argument is that the State failed to prove that the killing was “reckless” and that the result was caused by a tragic accident. Vehicular homicide requires that the Defendant possess the culpable mental state of “recklessness” in order to sustain a conviction. See Tenn. Code Ann. § 39-13-213(a); § 39-11-301(b).

“Reckless” refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.

Tenn. Code Ann. § 39-11-302(c).

The Defendant contends that he was neither reckless nor did his conduct consist of a “gross deviation” from the standard of care for operation of a motor vehicle. His primary attack is upon the veracity of the testimony of Mr. and Mrs. Reed, who observed the Defendant’s conduct. He contends that the State relied heavily upon the Reed’s testimony, which is so unbelievable that this Court can decline to consider it. See State v. Hornsby, 858 S.W.2d 892 (Tenn. 1993). He seeks to invoke the “physical facts rule” which provides that if a witness’ testimony is “entirely irreconcilable” with the physical evidence, it will be disregarded. See Id. at 894. The Defendant asserts that it would have been impossible for the Reeds to observe him in his vehicle when they were one-hundred yards behind him. Yet, Mr. Reed testified that initially they were closer to the Defendant’s vehicle, then increased their distance considerably because

they felt a collision was imminent. The Defendant also contends that because the expert accident reconstructionist concluded there was no head-on collision, the Reeds testimony was inaccurate. However, the impact areas on both vehicles are not inconsistent with the Defendant's crossing the center line into the victim's lane.

We find nothing so contradictory between the testimony of the Reeds and any other witness that it warrants invocation of the "physical facts rule." Therefore, we will consider the Reed's testimony when considering the sufficiency of the evidence.

Mr. Reed testified that he and his wife followed the Defendant for ten miles and for at least ten minutes. They observed the Defendant swerve onto the shoulder of the road and regain control of his vehicle. Mr. Reed mentioned at least four occasions when the Defendant crossed the center line, and suggested it happened more than those four noted occasions. The Reeds saw the Defendant's head drop to the side of the headrest and snap back several times. They saw one near-collision with an approaching van. They increased the distance between themselves and the Defendant after realizing that a collision was imminent. Mr. Reed testified that he would have called 911 prior to the collision if he had access to a car phone.

We feel that the Defendant's operation of his vehicle supports a finding of recklessness. There is evidence that the Defendant not only crossed the center line when the fatal collision occurred, but that he crossed the line a number of times over a ten-mile stretch of road and over the course of ten minutes or more.

When a driver drives of the wrong side of the road, this is sufficient to support an inference that there was implied malice, or recklessness. State v. Norris, 874 S.W.2d 590, 595 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993). Continuing to operate his vehicle on a two-lane highway, at dusk, after losing control several times suggests that the Defendant was aware of, yet disregarded the risks of his conduct. Such conduct also supports a finding of a gross deviation from the expected standard of care. “[N]ot every casual or incidental driving on the wrong side of the road where a collision ensues [invokes] criminal liability.” Id. (quoting Trentham v. State, 206 S.W.2d 291, 291-92, 185 Tenn. 271, 273 (Tenn. 1947). “The test appears to be whether or not the driver, violating the highway statute in the particular above considered, does so consciously, or under circumstances which would charge a reasonable prudent person with appreciation of the fact and the anticipation of consequences injurious or fatal to others.” Trentham, 206 S.W.2d at 292, 185 Tenn. at 273.

Regarding the remaining elements of the offense of vehicular homicide, it is clear not only that a death occurred, but that the Defendant was operating the vehicle. It is also apparent that the killing was the proximate result of the Defendant’s conduct, crossing the center line, that created a substantial risk that resulted in a death.

We will not reweigh or reevaluate the credibility of the witnesses in this case. Obviously, the jury accredited Mr. Reed’s testimony that the Defendant repeatedly and without justification drifted into the opposite lane of traffic. As a result, they found that the Defendant was guilty of the reckless killing of Mr. Milton

Sanders. The Defendant has failed to show that the evidence was insufficient to prove vehicular homicide beyond a reasonable doubt.

## II. Failure to Charge a Requested Jury Instruction

Next, the Defendant contends that the trial court erred by not providing the jury an instruction requested by defense counsel. At trial, the Defendant's counsel contended that the Defendant was not guilty of a criminal act and that it was, at most, an accident. He requested a special jury instruction in writing pursuant to Rule 30, Tennessee Rules of Criminal Procedure. Consistent with his theory, defense counsel requested that the trial court charge the jury with the objectives of the criminal code. The pertinent language is as follows:

**39-11-101. Objectives of criminal code.** - The general objectives of the criminal code are to:

(1) Proscribe and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property or public interest for which protection through the criminal law is appropriate.

The trial court considered the Defendant's request, but declined to include the requested instruction in the jury charge. The trial court did charge the jury with the law applicable to vehicular homicide, as well as for the lesser included offense of criminally negligent homicide.<sup>2</sup>

The Defendant asserts that the failure to include the special instruction constitutes reversible error. He focuses on the purpose of the code to "prevent

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<sup>2</sup> Tenn. Code Ann. § 39-13-212.

conduct that unjustifiably and inexcusably causes or threatens harm.” He notes that the trial judge had reservations as to the jury’s ability to understand the difference between criminal conduct and an accident, yet refused to issue the instruction.

A defendant is entitled to a complete and correct charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). A trial judge should properly instruct the jury on the law governing issues raised by the evidence introduced at trial. State v. McAfee, 737 S.W.2d 304, 308 (Tenn. Crim. App.1987). If a trial judge gives instructions that correctly, fully, and fairly set forth the applicable law, it is not error to refuse to give a requested special instruction. State v. Bohanan, 745 S.W.2d 892, 897 (Tenn.Crim.App.1987), perm. to appeal denied, (Tenn.1988). Upon reviewing the entire charge we may only invalidate it if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law. In re Estate of Elam, 738 S.W.2d 169, 174 (Tenn.1987).

Special instructions should be given if "fundamental" to the case. Where the charge is one that is "fundamental in nature" and "essential to a fair trial," failure to give the charge may result in error. State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994); Teel, 793 S.W.2d at 249; Souey v. State, 81 Tenn. (13 Lea) 472, 480 (1884).

Here, the trial court charged the jury on the law applicable to vehicular homicide and criminally negligent homicide in conformity with Tennessee Pattern Jury Instructions. The trial court heard counsel’s argument to include the special instruction and determined that the criminal versus accidental nature of the

Defendant's conduct was not an issue raised by the facts of the case. The trial court stated "if there was only one time-- if the testimony was that the defendant crossed the center line and there was an accident, it wouldn't get to the jury. I would take it from the jury and rule as a matter of law this is not a criminal case. It becomes possibly a criminal case under the facts of this case that a rational trier of fact could find based upon the testimony . . . ."

The trial court also discussed defense counsel's concern that the jury should be informed of the goals of the criminal code and that they would not know what conduct was unjustifiable or inexcusable for lack of a clear definition, particularly because of the phrase "gross deviation" as is contained in the definition of recklessness. However, this Court has held that a similar definition for criminal negligence, also containing the phrase "gross deviation" was not unconstitutionally vague or misleading. State v. Butler, 880 S.W.2d 395 (Tenn. Crim. App. 1994). The trial court resolved the issue, and we agree, on the ground that the individual criminal statute for vehicular homicide states what conduct is unjustifiable and inexcusable and is criminal in nature. If a jury determines that the Defendant has satisfied the elements of vehicular homicide beyond a reasonable doubt, that conduct is clearly proscribed under the criminal code. An instruction on the objectives of the criminal code was not reflective of a fundamental issue, given the facts in this case. We further note that the jury was charged on criminally negligent homicide, the lesser included offense that requires only that a person "ought to be aware of a substantial and unjustifiable risk." Tenn. Code Ann. § 39-11-302(d); see § 39-13-212(a). Yet, the jury found the evidence supported the greater mens rea requirement of recklessness to convict of vehicular homicide. Clearly, the criminal or non-criminal nature of the

Defendant's conduct did not arise as an issue fundamental to his case. The trial court did not err in declining to charge the requested jury instruction.

In light of the foregoing, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JERRY L. SMITH, JUDGE